

Subpart 25.2 - Buy American-Construction Materials

Parent topic: [Part 25 - Foreign Acquisition](#)

25.200 Scope of subpart.

(a) This subpart implements-

(1) [41 U.S.C. chapter 83](#), Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019; and

(4) Waiver of the domestic content test of the Buy American statute for *acquisitions* of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.201(b)(2)(ii).

(b) It applies to contracts for the *construction*, alteration, or repair of any public building or public work in the *United States*.

(c) When using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) for *construction*, see [subpart 25.6](#).

25.201 Policy.

(a) Except as provided in [25.202](#), use only *domestic construction materials* in *construction* contracts performed in the *United States*.

(b) The Buy American statute restricts the purchase of *construction materials* that are not *domestic construction materials*. For manufactured *construction materials*, the Buy American statute and E.O. 13881 use a two-part test to define *domestic construction materials*.

(1) The article *must* be manufactured in the *United States*; and

(2)

(i) Except for *construction material* that consists wholly or *predominantly of iron or steel or a combination of both*, the cost of *domestic components* *must* exceed 55 percent of the cost of all the *components*. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for *acquisitions* of COTS items (see 12.505(a)).

(ii) For *construction material* that consists wholly or *predominantly of iron or steel or a combination of both*, the cost of *foreign iron and steel* *must* constitute less than 5 percent of the cost of all the *components* used in such *construction material* (see the definition of "*foreign iron and steel*" at 25.003). The cost of *foreign iron and steel* includes but is not limited to the cost of foreign

iron or *steel mill products* (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the *construction material* and a good faith estimate of the cost of all foreign iron or *steel components* excluding COTS *fasteners*. This domestic content test of the Buy American statute has not been waived for *acquisitions* of COTS items in this category, except for COTS *fasteners*.

25.202 Exceptions.

(a) When one of the following exceptions applies, the *contracting officer* may allow the contractor to acquire *foreign construction materials* without regard to the restrictions of the Buy American statute:

(1) *Impracticable or inconsistent with public interest*. The *head of the agency* may determine that application of the restrictions of the Buy American statute to a particular *construction material* would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(2) *Nonavailability*. The *head of the contracting activity* may determine that a particular *construction material* is not mined, produced, or manufactured in the *United States* in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at [25.104\(a\)](#) and the procedures at [25.103\(b\)\(1\)](#) also apply if any of those articles are acquired as *construction materials*.

(3) *Unreasonable cost*. The *contracting officer* concludes that the cost of *domestic construction material* is unreasonable in accordance with [25.204](#).

(4) *Information technology that is a commercial product*. The restriction on purchasing *foreign construction material* does not apply to the *acquisition* of *information technology* that is a *commercial product*, when using Fiscal Year 2004 or subsequent fiscal year funds (section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

(b) *Determination and findings*. When a determination is made for any of the reasons stated in this section that certain *foreign construction materials* may be used, the *contracting officer* must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public *inspection*.

(c) *Acquisitions under trade agreements*. For *construction* contracts with an estimated *acquisition* value of \$7,032,000 or more, see [subpart 25.4](#).

25.203 Preaward determinations.

(a) For any *acquisition*, an *offeror* may request from the *contracting officer* a determination concerning the inapplicability of the Buy American statute for specifically identified *construction materials*. The time for submitting the request is specified in the *solicitation* in paragraph (b) of either [52.225-10](#) or [52.225-12](#), whichever applies. The information and supporting data that *must* be included in the request are also specified in the *solicitation* in paragraphs (c) and (d) of either

[52.225-9](#) or [52.225-11](#), whichever applies.

(b) Before award, the *contracting officer must* evaluate all requests based on the information provided and *may* supplement this information with other readily available information.

25.204 Evaluating offers of foreign construction material.

(a) *Offerors* proposing to use *foreign construction material* other than that listed by the Government in the applicable clause at [52.225-9](#), paragraph (b)(2), or [52.225-11](#), paragraph (b)(3), or covered by the WTO GPA or a Free Trade Agreement (paragraph (b)(2) of [52.225-11](#)), *must* provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless the *head of the agency* specifies a higher percentage, the *contracting officer must* add to the offered price 20 percent of the cost of any *foreign construction material* proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of *domestic construction materials*. In the case of a tie, the *contracting officer must* give preference to an *offer* that does not include *foreign construction material* excepted at the request of the *offeror* on the basis of unreasonable cost.

(c) *Offerors* also *may* submit *alternate offers* based on use of equivalent *domestic construction material* to avoid possible rejection of the entire *offer* if the Government determines that an exception permitting use of a particular *foreign construction material* does not apply.

(d) If the *contracting officer* awards a contract to an *offeror* that proposed *foreign construction material* not listed in the applicable clause in the *solicitation* (paragraph (b)(2) of [52.225-9](#), or paragraph (b)(3) of [52.225-11](#)), the *contracting officer must* add the excepted materials to the list in the *contract clause*.

25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American statute after contract award, the contractor *must* explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the *contracting officer* concludes that the contractor *should* have made the request before contract award, the *contracting officer may* deny the request.

(b) The *contracting officer must* base evaluation of any request for a determination regarding the inapplicability of the Buy American statute made after contract award on information required by paragraphs (c) and (d) of the applicable clause at [52.225-9](#) or [52.225-11](#) and/or other readily available information.

(c) If a determination, under [25.202\(a\)](#), is made after contract award that an exception to the Buy American statute applies, the *contracting officer must* negotiate adequate consideration and modify the contract to allow use of the *foreign construction material*. When the basis for the exception is the unreasonable price of a *domestic construction material*, adequate consideration is at least the differential established in [25.202\(a\)](#) or in accordance with agency procedures.

25.206 Noncompliance.

The *contracting officer* must-

- (a) Review allegations of Buy American statute violations;
- (b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of *foreign construction material* and request a reply, to include proposed corrective action; and
- (c) If the review reveals that a contractor or subcontractor has used *foreign construction material* without authorization, take appropriate action, including one or more of the following:
 - (1) Process a determination concerning the inapplicability of the Buy American statute in accordance with [25.205](#).
 - (2) Consider requiring the removal and replacement of the unauthorized *foreign construction material*.
 - (3) If removal and replacement of *foreign construction material* incorporated in a *building or work* would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the *contracting officer* may determine *in writing* that the *foreign construction material* need not be removed and replaced. A determination to retain *foreign construction material* does not constitute a determination that an exception to the Buy American statute applies, and this *should* be stated in the determination. Further, a determination to retain *foreign construction material* does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American statute, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.
 - (4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with [subpart 9.4](#). If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.